APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

EFREM LABOKE and
EUNICE LABOKE,

Plaintiffs,

v. Civil Action
No. 81-2168

ALLEN LOWDERMILK,
ALLEN MARK LOWDERMILK,
GREYHOUND LINES, INCORPORATED,
a corporation, and
WESTERN UNION TELEGRAM AND
TELEGRAPH COMPANY, INC.,
a corporation,

Defendants.

ENTERED
AUG 3 1981
___ORDER BOOK
NO ___ PAGE ___

MEMORANDUM ORDER

Plaintiffs filed this action on May 15, 1981, alleging eight causes of action resulting from a confrontation at the Fairmont, West Virginia Greyhound bus station. The case is presently pending before the Court on defendants' motions to dismiss. Defendants assert that this action should be dismissed for failure to file within the appropriate statutes of limitation.[1]

[1]A party may raise the defense of limitations by means of 12(b) of the Federal Rules of Civil Procedure. See 2A Moore's Federal Practice, §5 *12.10.*

For the purposes of this motion, the following facts alleged in the complaint will be accepted as true:

On or about April 1, 1979, around 1:45 p.m., plaintiff, Efrem Laboke, appeared at the Western Union Telegraph office located in the Fairmont Greyhound bus station to receive a money-gram. When plaintiff requested the money-gram, he was attacked by Allen Mark Lowdermilk, an employee of Greyhound and Western Union. As a result of the altercation, Efrem Laboke was arrested and tried before a jury in Magistrate court in Marion County. On December 6, 1979, the plaintiff was acquitted of the charge of battery.

It is well settled that federal courts should apply appropriate state statutes of limitation when Congress has not provided otherwise. *Johnson v. Davis,* 582 F.2d 1316 (4th Cir. 1978). The appropriate West Virginia statute is found in 55-2-12 of the West Virginia Code.

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that in case a party die, it could not have been brought at common law by or against his personal representative.

The event giving rise to plaintiffs' claims of a civil rights violation, assault and battery, breach of contract, tort of outrage, negligence, and loss of consortium, occurred on April 1, 1979. The claims for malicious prosecution and

libel and slander apparently accrued on December 6, 1979, when plaintiff, Efrem Laboke, was acquitted in Magistrate court of Marion County.

After careful consideration of the issues presented by the motions, the Court hereby finds the following:

1. Count I of the complaint alleging civil rights violations is barred by West Virginia's two-year statute of limitation. See *Cox v. Stanton,* 529 F.2d 47 (4th Cir. 1975).

2. Count II, based on allegations of malicious prosecution, is barred by West Virginia's one-year statute of limitation. See *Cavendish v. Moffit,* 253 S.E. 2d 558 (W. Va. 1979).

3. Count III, for damages due to an assault and battery, is barred by West Virginia's two-year statute of limitations.

4. Count IV charging defendants with libel and slander is barred by West Virginia's one-year statute of limitations. See, *Cavendish,* supra.

5. Count V alleges breach of the contract for faithful performance of the services in delivering the money represented by the money-gram ultimately resulting in personal injuries perpetrated by the tort. Such allegation, however, stems from common law pleading once proper under West Virginia law. It sounds in tort and allegedly having resulted in personal injury is barred by West Virginia's two-year statute of limitations. See, *Maynard, v. General Electric Company,* 486 F.2d 538 (4th Cir. 1973).

6. Count VI, based on the tort of outrage, is not a recognizable cause of action in West Virginia.

7. Count VII, a negligence claim, is barred by West Virginia's two-year statute of limitations.

8. Count VIII, loss of consortium, is barred by West Virginia's two-year statute of limitations.

For the above-stated reasons, it is hereby ORDERED that defendants' motions to dismiss be granted and this action dismissed and stricken from the court's docket.

The Clerk is directed to send certified copies of this Memorandum Order to all counsel of record.

ENTER: August 31, 1981

DENNIS R. KNAPP, CHIEF JUDGE

A TRUE COPY, Certified this
1st day of Sep, 1981
RONALD D. LAWSON, CLERK
BY /s/_____
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

EFREM LABOKE and
EUNICE LABOKE,

Plaintiffs,

v. Civil Action
No. 81-2168

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GREYHOUND LINES, INCORPORATED,
a corporation, and
WESTERN UNION TELEGRAM AND
TELEGRAPH COMPANY, INC.,
a corporation,

Defendants.

JUDGMENT ORDER

In conformity with its Memorandum Order entered this date, the court

ORDERS that (1) Defendants' Motions to Dismiss be granted; and

that (2) this action be dismissed and stricken from the court's docket.

ENTER: August 31, 1981

DENNIS R. KNAPP, CHIEF JUDGE

A TRUE COPY, Certified this
31 day of Aug, 1981
RONALD D. LAWSON, CLERK
BY /s/_____
DEPUTY

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

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Defendants.

ENTERED
AUG 31 1981
Civil ORDER
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No. 88 PAGE 38

JUDGMENT ORDER

In conformity with its Memorandum Order entered this date, the court

ORDERS that (1) Defendants' Motions to Dismiss be granted; and

that (2) this action be dismissed and stricken from the court's docket.

ENTER:

/s/

DENNIS R. KNAPP, CHIEF JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1941

Efrem Laboke and Eunice Laboke,

Appellants,

versus

Allen Loudermilk; Allen Mark Loudermilk; Greyhound Lines, Incorporated; Western Union Telegram and Telegraph Company, Inc.,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

Argued September 13, 1982 Decided November 4, 1982

Before SPROUSE and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Clement Theodore Cooper (William W. Pepper on brief) for Appellants; Edward W. Eardley (Steptoe & Johnson; John S. Haight; Ralph C. Dusic on brief) for Appellees.

PER CURIAM:

The plaintiff brought this action seeking damages arising out of a physical assault that occurred on April 1, 1979, and out of a criminal prosecution that ended by acquittal on December 6, 1979. The district judge granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b), finding that the plaintiff's complaint on its face showed his action to be time-barred.

We affirm.

The statute of limitations defense may appropriately be raised by motion under Rule 12(b)(6). *See* 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 12.10, at 2314, 3d Ed. (1982). The parties do not dispute that the applicable limitations are set forth in West Virginia Code § 55-2-12(b) (two year period for personal injury claims) and *id.* § 55-2-12(c) (one year for other matters not actionable by personal representative if party dies). It appears on the face of the complaint that the brawl which plaintiff claims resulted in his personal injuries occurred more than two years before the bringing of this suit on May 15, 1981, and that the criminal prosecution alleged to have been malicious and defamatory occurred more than one year before. There appearing on the face of the complaint no disputed issues of fact with respect to the applicable limitation periods, the district judge properly found all claims to be time-barred.

AFFIRMED.